

Chapter IX

PROSECUTIONS: HEALTH QUALITY ENFORCEMENT SECTION

A. Overview of Function and Updated Data

After a Medical Board district office has completed an investigation yielding sufficient evidence of chargeable physician misconduct, the case is transmitted to the Attorney General's Health Quality Enforcement (HQE) Section for administrative action, and/or to the appropriate state or local prosecutor for criminal or civil enforcement action. Under Government Code section 12529 *et seq.*, HQE is responsible for prosecuting disciplinary proceedings against MBC licensees; it is also charged with assisting MBC with complaint intake and investigation activities in support of those prosecutions. To implement its responsibility to assist with investigations, HQE created the Deputy in District Office (DIDO) program in 1997. To assist with complaint intake, HQE formally assigned a deputy attorney general to MBC's Central Complaint Unit on October 1, 2003.

As of the 2003–04 fiscal year, HQE was staffed by a Senior Assistant Attorney General, six supervising deputies attorney general (SDAGs), and 36 deputies attorney general (DAGs) stationed in six offices across the state. In 2003–04, HQE received 580 cases transmitted from MBC investigators (on par with the previous three-year average), filed 262 accusations (down from a 2001–02 high of 329 but about average for the past five years), obtained 48 prefiling stipulations and 202 post-filing stipulations, and conducted 45 administrative hearings.

As of fiscal year 2004–05, HQE staffing remained static, with 36 DAGs, six SDAGs, and the HQE chief. In the absence of major additional resources or process changes, its enforcement throughput — reflected in Exhibit IX-A below — also remained essentially the same in 2004–05. HQE received 521 cases transmitted from MBC, filed 235 accusations (down 10% from the prior year), obtained 63 prefiling stipulations (up 30% but entirely attributable to increased public letters of reprimand) and 210 post-filing stipulations, and conducted a comparable 49 administrative hearings.¹⁶⁶

¹⁶⁶ The Monitor again notes that each complex disciplinary case is different and urges caution in comparisons of one year's caseload with that of another. See *Initial Report*, *supra* note 13, at note 209.

Ex. IX-A. Health Quality Enforcement Section: Enforcement Throughput

	Activity	FY 1999–00	FY 2000–01	FY 2001–02	FY 2002–03	FY 2003–04	FY 2004–05
HQE	Cases transmitted to HQE by MBC	491	510	589	494	580	521
	Pre-filing public letters of reprimand	19	17	19	17	29	49
	Other pre-filing stipulations	15	15	14	12	19	14
	Cases in which HQE declined to file	31	24	25	34	19	21
HQE/ OAH	ISO/TRO sought (can be pre- or post-filing of accusation)	21	34	40	24	26	40
	Full ISOs/TROs granted	13	10	17	12	19	26
	Partial restriction granted	6	7	9	0	3	3
	Stipulations not to practice (can be pre- or post-filing of accusation)	2	3	5	5	0	2
	Accusations filed	262	238	329	258	262	235
	Petitions to revoke probation filed	28	18	21	18	26	26
	Post-filing public letters of reprimand	14	10	13	11	12	5
	Other post-filing stipulations	242	185	158	206	202	210
	Accusations withdrawn	71	45	32	35	44	25
	Evidentiary hearings held	49	44	39	44	45	49
	Accusations dismissed after hearing	12	9	16	10	20	8
	Defaults (respondent failed to appear)	30	14	15	22	21	24

Source: Medical Board of California

Exhibits IX-B and IX-C below and MBC's 2004–05 *Annual Report* reflect the present pattern of HQE cycles times as calculated by MBC,¹⁶⁷ with particular emphasis on the time it takes to file accusations in the six HQE offices. The average time between HQE's receipt of a fully investigated case and the filing of the accusation is once again on the rise, from the 60–70 day level reported by HQE in the 2001–03 period, to 107 days average in 2003–04, to the 2004–05 average of 116 days (see Exhibit IX-B below). In particular, the average filing time of the Los Angeles office (in excess of five months, as before) reflects the continuing critical staffing shortage in that office.

As indicated in Exhibit IX-C below, the age of pending cases with no pleading filed gives a similar insight into the backlog issue. In all the high-volume offices except Sacramento (including Los Angeles, San Diego, and San Francisco), the age of pending cases averages about five months or more, and four of the six offices show greater case aging in 2004–05 than the prior year.

Although greatly reduced from historical highs of as much as 365 days to filing, the current filing statistics show a generally static or worsening picture in case cycle times at HQE. A significant component of the average 2.5 year disciplinary processing time is still the HQE filing

¹⁶⁷ As observed in the *Initial Report*, *supra* note 13 at 168, MBC and HQE presently use wholly separate case tracking systems and significantly different definitions of case events. As a result, HQE statistics — which define not filing but “transmittal” to MBC’s executive director — show significantly shorter “filing” times than do MBC statistics. Discussed further below and in Chapters V and VII above, this disconnect between closely related systems illustrates yet again why the investigative and prosecutorial functions must be united into a single teamwork system.

process. As explained in the *Initial Report*,¹⁶⁸ the filing of the accusation turns a confidential investigation into a matter of public record which is posted on MBC's Web site, and a delay in accusation filing means a delay in notice to the public about a potentially dangerous physician.

**Ex. IX-B. Attorney General's Office Case Cycle Times:
Processing Time to Filing of Pleading (FY 2004–05)**

HQE Office	Total number of pleadings filed	Total number of days pending in AG's office before pleading filed	Average age when pleading filed
Fresno	2	475	237.50 (7.92 months)
Los Angeles	71	11,194	157.66 (5.26 months)
Oakland	12	1,193	99.42 (3.31 months)
Sacramento	32	3,131	97.84 (3.26 months)
San Diego	65	7,191	110.63 (3.69 months)
San Francisco	79	7,106	89.95 (3 months)
TOTALS	261	30,290	116.05 (3.87 months)

Source: Medical Board of California

**Ex. IX-C. Attorney General's Office Case Cycle Times:
Age of Pending Cases with No Pleading Filed (6/30/2005)**

HQE Office	Total number of unfiled cases	Total number of days pending as of 6/30/05	Average days per unfiled case
Fresno	3	290	96.67 (3.22 months)
Los Angeles	53	7,680	144.91 (4.83 months)
Oakland	1	154	154 (5.13 months)
Sacramento	11	1,112	101.09 (3.37 months)
San Diego	38	7,380	194.21 (6.47 months)
San Francisco	19	2,851	150.05 (5 months)
TOTALS	125	19,467	155.74 (5.19 months)

Source: Medical Board of California

Updating the status of a key vehicle for prompt disciplinary action, Exhibit IX-D shows the trends in HQE Penal Code section 23 appearances and orders. As described in the *Initial Report*, Penal Code section 23 permits HQE to appear in any criminal proceeding against an MBC licensee “to furnish pertinent information, make recommendations regarding specific conditions of probation,

¹⁶⁸ *Id.* at 168.

or provide any other assistance necessary to promote the interests of justice and protect the interests of the public.” HQE continues an impressive batting average of success in orders sought. The reduction in the number of appearances reflects, at least in part, the brief uncertainty surrounding this process following the limiting appellate court decision in *Gray v. Superior Court*.¹⁶⁹ However, this tool remains underutilized in a state with 120,000 licensed physicians and surgeons.

Ex. IX-D. HQE Penal Code § 23 Appearances

Activity	FY 1999–00	FY 2000–01	FY 2001–02	FY 2002–03	FY 2003–04	FY 2004–05
Total PC 23 Appearances	9	10	10	9	16	9
Total PC 23 Orders Issued	11	11	12	8	15	7

Source: Medical Board of California

B. The Monitor’s Findings and HQE/Legislative Responses

The following summarizes the Monitor’s *Initial Report* findings and concerns about the performance of HQE, and documents the responses to those findings implemented by the Attorney General’s Office, the Medical Board, and the Legislature during 2005. More detail on each of the findings is available in Chapter IX of the *Initial Report*.¹⁷⁰

1. HQE cycle times remain lengthy, including recent increases in the filing phase.

Without increased staff or improved process efficiency, HQE continues to experience lengthy case processing times, notwithstanding the efforts of a group of experienced and hardworking DAGs and supervisors. HQE is seeing further erosion of earlier progress in the filing phase — the one aspect over which the Attorney General has primary (although not exclusive) control. MBC statistics for fiscal year 2004–05 reveal an average 116-day period between transmittal of the completed investigation by MBC and the filing of the accusation, up from 107 days last year and 60–70 days in 2001, before HQE staffing shortages took hold.

As noted in the *Initial Report*,¹⁷¹ HQE and MBC management use different statistical definitions of key events, and HQE reports shorter “filing times.” HQE measures the average time from its acceptance of an investigated case to the transmittal of the draft accusation to MBC — as opposed to

¹⁶⁹ 125 Cal. App. 4th 629 (2005).

¹⁷⁰ *Initial Report*, *supra* note 13, at 168–76.

¹⁷¹ *Id.* at 168; *see supra* Ch. V.B.3.

filing — and reports a range of 29 to 92 days during 2004–05, depending on the HQE office. However, HQE management readily acknowledges that the average time to file pleadings has doubled in the past three or four years — an increase HQE attributes to the 2001–04 reductions in attorney staff in the high-volume Los Angeles office. Discussed below is the Monitor’s primary recommendation to address long case cycle times and case efficiency concerns — the successful implementation of the vertical prosecution system, beginning January 1, 2006.

2. HQE attorney staffing is insufficient to meet its statutory and operational requirements.

Government Code section 12529(c) requires HQE to be “staffed with a sufficient number of experienced and able employees that are capable of handling the most complex and varied types of disciplinary actions.” In the *Initial Report*, the Monitor found that HQE’s six offices suffered a 15% loss of attorney positions since early 2002.¹⁷² No remedy has been forthcoming. As noted above, current HQE staffing remains identical to its reduced size during November 2004. Senior managers report that HQE lacks a sufficient number of DAGs to meet the statutory mandate of Government Code section 12529(c), especially in HQE’s Los Angeles office.

The overall HQE staffing picture is a principal factor in MBC’s inability to move its disciplinary cases rapidly to conclusion statewide. The reduced staff level contributes to the growing delays in case pleading, and leaves little time for remaining DAG and SDAG staff to adequately train newer attorneys, perpetuating a cycle of lowered efficiency. In Recommendation #35, the Monitor called on the Attorney General’s Office to come into full compliance with Government Code section 12529(c) by adequately staffing HQE to restore lost attorney positions and to fulfill all missions required by the statutes that created HQE.

Over the past three years, the Department of Justice has submitted budget change proposals (BCPs) to obtain permission to add four new DAG positions, but these have been rejected because no available MBC funding could be identified. As recently as September 2005, DOJ submitted another BCP for four additional DAGs for fiscal year 2006–07, but this proposal was withdrawn pending the enactment of SB 231 (Figueroa). HQE’s staffing woes are now exacerbated by a number of vacancies in established attorney positions. In his September 20, 2005 letter to Attorney General Bill Lockyer, Medical Board President Ronald Wender, M.D., directed attention to the vacancies in HQE which are “causing delays in filing accusations and setting matters for hearing, and therefore, impacting public protection.” Dr. Wender urged the Attorney General to “move quickly to fill all vacant positions in this vital section of the Attorney General’s Office.” The Monitor fully endorses that recommendation, and adds that success in implementing vertical

¹⁷² *Initial Report*, *supra* note 13, at 169.

prosecution, and in reducing disciplinary delays generally, will almost certainly depend on filling vacant attorney positions and ending HQE understaffing.

As noted above, SB 231 increases physician licensing fees by 30%, and a portion of the increased revenues has been earmarked for reinstatement of lost DAG positions.¹⁷³ The Monitor urges relevant control agencies to approve the creation of those positions which are vital to the success of vertical prosecution.

3. Attorney/investigator coordination and teamwork is inadequate.

Notwithstanding diligent staff efforts, the traditional system linking HQE prosecutors with MBC investigators has been and still is characterized by inadequate coordination and teamwork. HQE prosecutors still generally receive “hand-off” cases which have been investigated and assembled by MBC investigators with little or no input whatsoever from the HQE trial prosecutor who will handle the case. Most HQE prosecutors complain that they do not play a role in shaping the cases they receive or the investigative plans and strategies behind them, often resulting in last-minute changes of case direction, amended pleadings, and delays as cases are reinvestigated. Equally critical, HQE DAGs today frequently have little or no investigator assistance at the hearing itself.

The principal discussion of the present HQE and MBC case coordination relationship is found in the *Initial Report*¹⁷⁴ and in Chapter VII above, and that analysis is incorporated here. In *Initial Report* Recommendations #22 and #33, the Monitor called for a sweeping reform of the basic model of MBC and HQE disciplinary interaction with the implementation of the vertical prosecution system (described at length in the *Initial Report* and in Chapter VII.C. above), in which an attorney/investigator team is formed at the inception of an investigation and works together to the case’s conclusion.¹⁷⁵ The enactment of SB 231 (Figueroa), detailed in Chapters IV and VII above, mandates the implementation of the vertical prosecution model by January 1, 2006, and provides the mechanism for full integration of MBC’s investigators and supervising investigators into HQE by 2008 if the initial implementation is adjudged successful by the Legislature.

Vertical prosecution will call for a number of significant structural, operational, and attitudinal changes in both HQE and MBC, including the addition of sufficient staff to operate the new system, the creation of a workable system of case assignments within the team concept, the adoption of an appropriate supervision system for peace officer investigators and HQE attorneys,

¹⁷³ See *supra* Ch. V.B.2.

¹⁷⁴ *Initial Report*, *supra* note 13, at 129–40.

¹⁷⁵ *Id.* at 149, 176.

decisionmaking on physical plant and equipment, joint agreement on operational protocols and the drafting of an operations manual to reflect them, joint retraining, coordination of management information systems, and development of new evaluative standards and methods of course correction. The Monitor's recommendations for each aspect of the implementation of vertical prosecution are presented in detail in Chapter VII.C. above.

Carlos Ramirez, Senior Assistant Attorney General (SAAG) in charge of HQE, and his supervisorial staff are already working closely with MBC managers to plan the transition to the vertical prosecution system. Extensive discussions in September and October 2005 resulted in a general consensus on the basic process and the essential transitional details of implementation. A series of staff training programs is planned for early December 2005, and HQE is prepared to go forward under the new system in January 2006.

The enactment of SB 231 will change the HQE enforcement process profoundly, and HQE leadership has supported and embraced this change. The Monitor applauds the constructive approach and energetic efforts of HQE management and staff in beginning the changeover to this new and different team-based process. As noted in the implementation recommendations in Chapter VII.C., the attitudinal component of any such change is key, and clear leadership commitment to the new system is a prerequisite for success. That prerequisite is met in both HQE's and MBC's management today.

Based on the experiences of other regulatory and law enforcement agencies that utilize the vertical prosecution model, HQE attorneys will soon operate in a wholly different and more efficient environment, in which attorneys and investigators (and other staff) work together throughout the process, each professional bringing unique expertise and skills to each case team. HQE attorneys will direct the investigative plan and process, will be able to shape the cases they take to hearing, and will enjoy the invaluable benefits of a case partner in the prehearing and hearing phases of the disciplinary process. The positive impact of these changes on HQE attorneys and management will be immediate and profound. The Monitor predicts that in years to come HQE prosecutors will wonder how it was possible to use any other approach to this complex disciplinary process.

4. Attorney assistance is not used sufficiently in MBC's medical records procurement process.

The *Initial Report* expressed concern that HQE prosecutors seldom file subpoena enforcement actions or motions for sanctions for failure to produce medical records, contributing to the laxity in physician and institutional responses to MBC requests for medical records.¹⁷⁶ Monitor's

¹⁷⁶ *Id.* at 171–72.

Recommendations #7, #23, and #34 urged MBC and HQE to revise their medical records procurement and enforcement policies to ensure prompt compliance with records requests.

HQE management has embraced these recommendations, supported MBC's publicly disclosed policy of rigor with regard to records production, and encouraged its staff attorneys to make more frequent and aggressive use of existing sanctions and procedures to ensure records production. In March 2005, following MBC's formulation of its vigorous new "zero tolerance" policy, HQE management sent letters to defense counsel and various professional organizations advising them of the Board's new policy requiring adherence to Business and Professions Code sections 2225 and 2225.5.

HQE staff has responded with increased enforcement actions. Subpoena enforcement actions for medical records sought in fiscal year 2003–04 totaled only four statewide; HQE increased this figure to nine in 2004–05. No motions for sanctions for failure to produce were brought by HQE attorneys in 2003–04; HQE staff filed three such motions this past year. While these absolute numbers remain modest in light of the scope of the records production problem, such an increase in enforcement activity can have an impact disproportionate to the raw numbers. The attorneys representing doctors and institutions in these matters are a small group, and the word of a new enforcement policy and additional enforcement efforts spreads rapidly and can achieve a significant deterrent effect.

HQE's high-visibility enforcement notices and increased case activity no doubt played a role in the reduction of average document production times in the MBC district offices from 74 days in 2003–04 to 44 days in 2004–05.¹⁷⁷

SB 231 and its vertical prosecution reforms should also significantly assist in the medical records procurement process. The presence of an HQE trial attorney on the investigation team — ready and able to assist with prompt subpoena or sanction motions as needed — should only improve physician and institutional compliance with records requests.

5. HQE and MBC make inadequate use of ISO/TRO powers and the Penal Code section 23 authority.

The *Initial Report* called attention to the relatively modest use of legal tools available to MBC and HQE when a physician is an imminent danger to the public and continues to practice medicine.¹⁷⁸ The use of important expedited proceedings — including interim suspension orders (ISOs), temporary restraining orders (TROs), and probation order proceedings under Penal Code

¹⁷⁷ See *supra* Ch. VII.B.3.

¹⁷⁸ *Initial Report*, *supra* note 13, at 172–73.

section 23 — has declined in recent years. For example, ISOs/TROs sought by HQE on behalf of the Medical Board diminished from a high of 40 in 2001–02 to 26 in 2003–04 (a decline of 35%). Monitor’s Recommendation #37 called on MBC and HQE to make more extensive use of these potent tools.

In response to this recommendation, HQE stepped up its use of these proceedings significantly. Motions for ISO/TRO increased to 40 in fiscal year 2004–05 — a 50% increase. Exhibit IX-D above indicates that the number of Penal Code section 23 probation orders sought decreased to nine (of which seven were successful), largely due to the new procedural requirements imposed by the appellate court decision in *Gray v. Superior Court*.¹⁷⁹ The *Gray* opinion, which vacated and remanded a section 23 bail order prohibiting a doctor’s continued practice, found insufficient due process where the physician defendant was not given advance notice and an opportunity to research and present an informed opposition. Although *Gray* imposes a clarified system of procedural requirements for the section 23 process, it is the view of HQE management that these requirements can be readily met in most relevant instances. The new procedure should not prevent increased use of this expedited method of achieving an early public safeguard in appropriate cases.

The Monitor believes that early trial attorney involvement in the investigation — an integral part of the new vertical prosecution system under SB 231 — will result in increased use of these important tools for public safety. The Monitor urges HQE to continue its heightened emphasis on these procedures.

6. Needed improvements in HQE case tracking and management information systems have begun and must be properly implemented.

The Attorney General’s Office as a whole has long been subject to criticism for its outdated and antiquated management information system (MIS), as noted in the *Initial Report*.¹⁸⁰ To address these concerns, the Attorney General has finally installed and begun to use the long-awaited ProLaw management information system.

Implementation of ProLaw began at HQE in the summer of 2004 and — to some extent — the system is still in its developmental stage. HQE supervisors report that the system works well for basic case tracking and management review. The system allows them to track docket events accurately, and an increasingly deep pool of historical case data is being compiled. The change to

¹⁷⁹ 125 Cal. App .4th 629 (2005).

¹⁸⁰ *Initial Report*, *supra* note 13, at 173–74.

an entirely new MIS is a major undertaking, and HQE and DOJ as a whole merit recognition for getting this system up and running successfully.

However, in its early implementation ProLaw still has limitations as a management tool. HQE managers responsible for the system report that several desirable capabilities are not yet in place, including the ability to generate data for client reports, the ability to perform calculations of key data for management purposes (such as case cycle times and average caseloads), the ability to trace referrals to other prosecuting agencies, and a method of noting case priorities under Business and Professions Code section 2220.05. HQE is exploring these capabilities with the vendor and information systems staff, but the process is reported to be slow.

The advent of ProLaw represents an important step toward modernizing HQE's management information process. However, the system is a work in progress and is not yet capable of all the functions of an optimum management tool. Further development of ProLaw should continue to be a priority for HQE.

The enactment of SB 231 presents yet another opportunity for overall improvement of the MBC and HQE disciplinary process — the development of a jointly-operated management information system unifying the data capabilities of the two agencies. An integrated MIS is essential to the effective management and case tracking for the new vertical prosecution system. Although multiple options are available, the Monitor recommends that MBC acquire appropriate licenses for ProLaw and use that software to develop a unified management data system. MBC management is inquiring into this solution now. A unified MIS will also be important in the evaluation of the new teamwork system for purposes of continuous improvement and to meet the oversight requirements of the July 2007 report.

7. HQE has no formal policy and procedure manual to ensure uniformity and assist in training.

The *Initial Report* noted with dismay that HQE has no formal policy/procedure manual or operations manual in place to clearly reflect its functions and processes, leading to diverging policies, inconsistent practices, and a weakened training process.¹⁸¹ In Recommendation #38, the Monitor urged HQE to develop a formal policy and procedure manual to improve consistency of practice and to assist in prosecutor training.

HQE management readily agreed, and began a process aimed at outlining and then drafting an HQE operations manual. The Monitor has reviewed the resulting outline and is confident that

¹⁸¹ *Id.* at 174.

HQE is well on its way to completion of the requisite manual. However, the supervening enactment of SB 231 provides a tremendous opportunity to advance this project in the broader context of the vertical prosecution system by generating a joint operations manual for the newly combined efforts of MBC investigators and HQE attorneys.

Operational protocols and procedures for the new vertical prosecution system are now being worked out jointly by the management staffs of MBC and HQE in anticipation of the January 2006 implementation date. The Monitor recommends that these protocols be brought together into a single jointly-produced operations manual, equivalent in relevant respects to MBC's current *Enforcement Operations Manual*. A joint committee of appropriate supervisors and staff from both agencies should undertake this task and should remain in place to update and improve the manual continuously.

MBC and HQE managers have expressed support for the concept of a single operations manual (reflecting, at the very least, those aspects of activities undertaken together), to be drafted and distributed in the near future as the continuing guide for the new joint investigation/prosecution process. The Monitor believes the distribution of this joint manual would have immediate practical and symbolic significance, and should be among the highest priority projects for HQE and MBC in the near term.

8. The current venue statute for adjudicative hearings results in substantial and unnecessary costs for HQE, OAH, MBC and — ultimately — disciplined physicians and the physician population generally.

Prior to the changes brought about by SB 231, Government Code section 11508 generally assigned the venue for administrative hearings to the judicial district in which the transaction in question occurred or in which the respondent resides. The statute frequently required the costly scheduling of administrative hearings in cities in which HQE and OAH have no office facilities. Requiring adjudicative hearings to be held in cities in which HQE has an office and OAH has hearing facilities would substantially lessen costs for MBC, and in many cases for the respondent as well.¹⁸² In Recommendation #39, the Monitor urged amendment of this statute to end these costly venue results.

Section 22 of SB 231 amends Government Code section 11508(a) to require that MBC administrative hearings be held at the OAH facility closest to the location where the transaction occurred or the respondent resides. Defense concerns are fairly addressed, in that revised section 11508(b) preserves the possibility of parties stipulating to a different venue, and section 11508(c)

¹⁸² *Id.* at 175–76.

retains the respondent's ability to move for change of venue and the ALJ's discretion to order a venue change. However, absent good cause to the contrary identified in writing by the ALJ, hearings must now take place in a facility maintained by OAH. This will significantly change the wasteful practice under prior section 11508 and yield a clear public benefit.

C. Recommendations for the Future

■ ***Full implementation of vertical prosecution.*** Numerous recommendations for the full and successful integrated implementation of the vertical prosecution system under SB 231 are presented above in Chapter VII.C., and are incorporated here.

■ ***Adequate staffing of HQE.*** MBC and HQE must come into compliance with Government Code section 12529(c) (“[t]he Attorney General shall ensure that the Health Quality Enforcement Section is staffed with a sufficient number of experienced and able employees that are capable of handling the most complex and varied types of disciplinary actions”). The success of vertical prosecution hinges on the proper staffing of HQE.